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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. ALBERT POVADORA, Defendant and Appellant.	C067732 (Super. Ct. No. 09F07218)

A jury convicted defendant Albert Povadora of 17 criminal counts against four different women, including forcible rape, forcible sodomy, forcible oral copulation, kidnapping, and false imprisonment, and found true numerous special allegations, including personal use of a deadly weapon and commission of crimes against multiple victims. The trial court sentenced him to 315 years to life plus 17 years in state prison.

On appeal, defendant contends (1) one of the witnesses was permitted to give impermissible opinion testimony; (2) the prosecutor's use of a pointillist painting in closing argument denigrated the reasonable doubt standard; (3) it was reversible error for the trial court to give a "firecracker" instruction; (4) the cumulative effect of the

foregoing errors resulted in prejudice; (5) he was wrongly convicted of both kidnapping and the lesser included offense of false imprisonment; and (6) the trial court failed to determine his ability to pay the main jail booking fee and the main jail classification fee as required by Government Code section 29550.2. Agreeing only with the fifth contention, we shall modify the judgment and otherwise affirm the judgment.

FACTS AND PROCEEDINGS

Between 2008 and 2009, defendant victimized four women, Phoebe N., Venus H., Pamela W., and Tonya P., in the Sacramento area. The jury found defendant not guilty of charges related to a fifth woman, Norma F., and deadlocked on all charges related to a sixth woman, Sonia R. Facts related to the charges alleging sexual assaults against Norma F. and Sonia R. are mentioned herein where relevant.

Phoebe N. (Counts 1 through 7)

In the early morning hours of August 10, 2009, then 16-year old prostitute Phoebe N. got into defendant's gold-colored car and, after satisfying herself that he was not a police officer, agreed to have sex with him. Phoebe N. told defendant she was 19 and asked him for $70, which he agreed to pay without further discussion.

Defendant drove to an empty, unlit gravel lot and parked. He and Phoebe N. walked to the back of the lot where they were hidden by trees and bushes. When Phoebe N. asked for the money, defendant pulled a gun from his pants, held it to her back, and told her if she made any noises then, "like boom," or "bang." Defendant told her to take off her clothes. Phoebe N. told defendant she was only 16. Defendant said he was an undercover cop and that there were "a lot of UCs out here." He instructed Phoebe N. to get on the ground on her hands and knees; she complied. Defendant forced Phoebe N. to have anal sex. Phoebe N. asked him to stop, but he forced her to have vaginal sex and to orally copulate him. Defendant alternated between anal and vaginal sex approximately 20 times, putting his penis in her mouth multiple times as well. He ejaculated twice, once

in Phoebe N.'s mouth and once either in her vagina or her anus. Some of his ejaculate spilled onto Phoebe N.'s shirt.

During the assault, defendant placed the gun on the ground next to Phoebe N., picking it up whenever he heard something and taking it with him when he went to investigate what he had heard. Phoebe N. did not move or scream for fear defendant would shoot her.

Defendant told Phoebe N. he did not want to see her "out there in the streets and that he should take [her] in right now." He wiped his face with Phoebe N.'s shorts and left. Phoebe N. got dressed and texted a friend for a ride to her mother's house.

Once home, Phoebe N. threw her clothes into the closet, brushed her teeth, showered and got dressed. She waited approximately four hours and then went to the hospital.

The scratches on Phoebe N.'s knees and injuries to her anus were consistent with her account of the attack. Genetic testing on swabs taken from her vagina and cuttings taken from her shirt and shorts contained sperm matching defendant's DNA profile.

As to Phoebe N., the information alleged three counts of forcible sodomy (Pen. Code, §286, subd. (c)(2)) (undesignated statutory references that follow are to this code unless otherwise specified)--counts 1, 3, and 5), three counts of forcible rape (§ 261, subd. (a)(2)--counts 2, 4, and 6), and forcible oral copulation (§ 288a, subd. (c)(2)--count 7), with special allegations as to counts 1 through 7 that he personally used a deadly weapon (§ 12022.3, subd. (a)), personally used a deadly weapon in the commission of a sex offense (§ 667.61, subd. (e)(4)), and committed the offense against multiple victims (§ 667.61, subd. (e)(5)).

Venus H. (Counts 8-13)

In the early morning hours of August 27, 2009, defendant offered prostitute Venus H. a ride. She accepted and got into his beige-colored car. Venus H. would later

describe defendant as "black in color," something like "an islander, Hawaiian." Defendant was wearing gym shorts and a T-shirt, and had a white towel around his neck.

As he drove, defendant talked with Venus H. about sex. He asked Venus H. if she was open to having anal sex; she said "no." She told defendant she charged $40 for "regular sex." Defendant asked Venus H. if she was carrying any weapons. She told him she had a can of pepper spray in her purse. He told Venus H. he was a police officer, showed her a badge, and told her she was under arrest. Venus H. noticed defendant's shirt had a "police-type emblem" on it.

Defendant drove into a dead-end alley and parked. He got out of the car and instructed Venus H. to do the same. She complied, leaving her purse behind. Defendant told Venus H. to put her hands on top of the car. Again, she complied. He kicked her legs apart and patted her down. He also searched her purse, finding a can of pepper spray and throwing it into the car.

Defendant told Venus H. she did not have to go to jail if she did something for him, and told her to take off her pants. He forced her to have vaginal sex from behind as she stood with her hands on the car and her legs spread apart. He then forced her to have anal sex. As Venus H. cried and asked him to stop, defendant alternated back and forth between vaginal and anal sex. Venus H. kept falling over, angering defendant as he tried to hold her up and told her to stop crying.

Defendant grabbed Venus H. by the throat, picked her up and told her to lie down on the ground, which was covered in gravel. Venus H. complied, lying down on her back. At defendant's instruction, Venus H. took off her sweatshirt and gave it to him. He laid it on the ground and knelt on it in front of her, picked her legs up and put them over her shoulders and, as she cried and asked him to stop, he forced her to have vaginal sex and then anal sex, alternating back and forth in that manner approximately four or five times until he eventually ejaculated in her anus. Defendant got up and told Venus H. not to move. He went to the car, threw Venus H.'s purse out, and drove off.

Venus H. went home and texted her partner, Brandi B., that she "had just [run] into a cop . . . and he let me go for a price." Venus H. put her clothes in a plastic bag. She cleaned herself up and stayed in her room for the next three days until a friend convinced her to go to the hospital, where she eventually spoke with police, turned over the bag of clothing, and submitted to a sexual assault examination.

Injuries to Venus H.'s vaginal and anal areas were consistent with her account of the attack. Genetic testing on cuttings taken from Venus H.'s panties contained sperm matching defendant's DNA profile.

As to Venus H., the information alleged three counts of forcible sodomy (§ 286, subd. (c)(2))--counts 8, 10, and 12), and three counts of forcible rape (§ 261, subd. (a)(2)--counts 9, 11, and 13), with special allegations as to counts 8 through 13 that he committed the offense against multiple victims (§ 667.61, subd. (e)(5)).

Pamela W. (Counts 19-20)

On March 19, 2009, sometime between the hours of 10:00 p.m. and 2:00 a.m., Pamela W. was walking around downtown Sacramento. She and her boyfriend were having problems and she just wanted to "get away, just get out and about." Pamela W. had been diagnosed with bipolar disease and suffered from manic depression for which she had been prescribed medication. At trial, she could not recall whether she was taking her medication at the time.

As Pamela W. walked near a 24-Hour Fitness, defendant grabbed her from behind, dragged her into an alleyway, and threw her face-down onto the ground. When Pamela W. screamed, defendant hit her in the head with a gun and told her to "shut up." He pulled down her pants and ejaculated on them after masturbating. Defendant stood over Pamela W. and urinated on her, then forced her head into the urine. He held a gun to her head and threatened to kill her if she made a sound. He then pulled up his pants and ran away.

Pamela W. ran to the 24-Hour Fitness and reported the assault to Aaron C. at the front desk. She told Aaron C. she had just been attacked and raped. Aaron C. later described Pamela W. as disheveled and smelling of urine, and said she was "hysterical" and scared and looked like she had been crying. Aaron C. called mall security.

When security personnel arrived, Pamela W. told them what happened; however, they did not seem to take her seriously, so she left without calling the police.

As to Pamela W., the information alleged kidnapping to commit rape (§ 209, subd. (b)(1)--count 19) and false imprisonment (§ 236--count 20), with special allegations as to counts 19 and 20 that he was armed with a firearm (§ 12022, subd. (a)(1)).

Tonya P. (Counts 21-24)

On May 30, 2008, at approximately 9:00 p.m., Tonya P. went with some friends to a nightclub in midtown Sacramento, where she shared several drinks with her friend, Mary. After about an hour and a half, Tanya P. and her friends walked to another nearby bar. Tonya's friends left that bar at 11:00 p.m., but Tonya P. stayed to hang out with her friend Brittany, who worked at the bar.

At approximately 1:00 a.m. the next morning, Tonya P. left the bar and walked toward her home in Oak Park. Defendant approached her from behind and pointed a handgun at her head. He grabbed her arm, pulled her into an alleyway, and told her to cover her face with the sweatshirt she was wearing. Tonya P. complied. Defendant threatened to kill her, and told her to take off her shorts and lie down. Again, she complied, removing her shorts and underwear and lying down. Defendant knelt down and, pushing Tonya P.'s legs up, forced her to have vaginal sex. Tonya P. did not tell defendant to stop because she feared for her life. During the attack, defendant asked Tonya P. where she was from and what sports she liked. He asked her if she had had sex in the past five days. She told him, "No." Defendant claimed to have seen Tonya P. before. He said he knew her boyfriend, although she did not have one at the time, and

threatened to kill them both if she said anything. Next, defendant forced Tonya P. to have anal sex. It was painful and Tonya P. asked him to stop. Defendant returned to vaginal sex. At some point, he groped and kissed her breast.

When defendant was finished, he told Tonya P. to wait a few minutes and then she could go. When she got up, defendant was gone. She got dressed and ran home, where she washed herself and put on fresh clothing. She did not call the police because she feared defendant knew where she lived and would kill her and her family.

Tonya P. called her father, and told her friend, Mary, what happened. She went to the hospital and spoke with police about the assault. She retrieved the clothing from her home and accompanied police to the scene of the assault, and then went to another hospital to submit to a sexual assault examination.

Nurse Practitioner Nancy Siegel performed the examination on Tonya P. She observed fecal matter at the opening of Tonya P.'s anal area and the opening of her vaginal area. Tonya P.'s blood sample tested negative for alcohol and drugs. Genetic testing on swabs taken from her vagina and anus contained sperm matching defendant's DNA profile.

As to Tonya P., the information alleged kidnapping to commit rape (§ 209, subd. (b)(1)--count 21), two counts of forcible rape (§ 261, subd. (a)(2)--counts 22 and 24), and forcible sodomy (§ 286, subd. (c)(2)--count 23), with special allegations as to count 21 that he was armed with a firearm (§ 12022, subd. (a)(1)), and as to counts 22 through 24, that he personally used a deadly weapon (§ 12022.3, subd. (a)), personally used a deadly weapon in the commission of a sex offense (§ 667.61, subd. (e)(4)), committed the offense against multiple victims (§ 667.61, subd. (e)(5)), and kidnapped the victim in the commission of the offense (§ 667.61, subds. (d)(2) & (e)(1)).

Norma F. (Count 14)

On September 18, 2009, prostitute Norma F. called 911 and reported that she had been sexually assaulted. She gave the dispatcher defendant's license plate number. She reported that, at approximately 4:00 a.m., defendant picked her up in a gold car with tinted windows. Defendant told her he was a police officer, quickly flashed a badge, and told her she would have to do what he asked or she would go to jail. Norma F. said she "didn't care" and told defendant he "would just have to call the police 'cause I wasn't doing what he wanted me to do for free."

At trial, Norma F. testified that defendant drove to a nearby apartment complex and told her she would have to perform oral sex on him "and whatever else he wanted." They got out of the car and Norma F. told defendant she knew people at the complex and would scream. When defendant tried grabbing her by the arm, she jerked away, leaving scratches on her arm. Norma F. told defendant to get in his car and leave. He called her a "stupid bitch" and drove away.

As to Norma F., the information alleged assault with intent to commit rape, sodomy, or oral copulation (§ 220--count 14).

Sonia R. (Counts 15-18)

Prostitute Sonia R., 34 at the time of trial, has amnesia which most likely resulted from a prior aneurysm she suffered and for which she had brain surgery in 2004 or 2005. Sonia R. also suffered a concussion sometime after her brain surgery. As a result of those conditions, Sonia R. has problems with her memory. She also regularly drank alcohol at that time.

On September 11 or 12, 2009, between 2:00 a.m. and 4:00 a.m., defendant pulled up in a gold car with tinted windows and offered Sonia R. a ride. Sonia R. accepted and got in, and they drove around for about 10 minutes discussing whether defendant had

money and what he wanted to do. During the drive, Sonia R. noticed a badge with the words "Police Department" on it on the center console.

Defendant drove to a dead-end and parked. He told Sonia R. to put her hands on top of her head. He showed her some handcuffs and told her he had a gun in the trunk. Sonia R. noticed defendant's shirt bore an emblem resembling that of a police officer. When she asked defendant if he was a police officer, he repeatedly said "no," but told her "not to tell nobody anything about what's going to happen," otherwise she "was going to be arrested." Sonia R. put her hands on the hood of the car and defendant patted her down, touching her breasts, buttocks and vaginal area in the process.

Defendant instructed Sonia R. to undress; she complied. He handcuffed her behind her back, pushed her into the back seat of the car and put a towel over her face. He forced her to have vaginal sex, then turned her over onto her stomach and forced her to have anal sex. He alternated back and forth in that manner for approximately 10 or 15 minutes, ignoring her cries for him to stop. Defendant eventually ejaculated, and told Sonia R. to get out of the car and get dressed. She complied. He told her that, if she was stopped by police, she should tell them "Officer Drake says I'm on the way home." Defendant drove off, but stopped just down the road. Sonia R. picked up a rock and threw it at defendant's car window, then jumped a fence and fled towards her friend's house. She eventually went to a clinic.

Sonia R. was picked up by police on September 24, 2009, for soliciting prostitution. An officer told her someone was posing as a police officer, picking up prostitutes, and raping them. Sonia R. said she had heard the same through some friends about a week or two prior to her arrest. She also said other prostitutes had described the rapist as Puerto Rican, Filipino or black. Sonia R. told the officer about the incident with defendant a couple of weeks prior, and that defendant raped her by throwing a towel over her head and handcuffing her. She said defendant drove a gold and tan car and was "Hawaiian or black" with curly hair.

During an interview with Detective Newby on September 24, 2009, Sonia R. provided details of the assault, including a description of defendant, his white T-shirt bearing a "police-type emblem," the type of car he was driving, and the location of the assault. She told Detective Newby that about three weeks prior, but after her assault, she heard other prostitutes talking about someone going around assaulting prostitutes.

As to Sonia R., the information alleged two counts of forcible sodomy (§ 286, subd. (c)(2))--counts 15 and 17), and two counts of forcible rape (§ 261, subd. (a)(2)--counts 16 and 18), with special allegations as to counts 15 through 18 that he committed the offense against multiple victims (§ 667.61, subd. (e)(5)) and bound the victim (§ 667.61, subd. (e)(6)).

Search of Defendant's Home and Car

On September 18, 2009, at approximately 4:00 a.m., City of Sacramento police officer Michael Cuevas heard on his police radio that a suspect picked up a prostitute, "badged her with a gold badge," and said she would have to perform a sexual act on him or go to jail. Based on the description of the suspect and the license plate number provided, Officer Cuevas determined the vehicle was registered to defendant.

Officer Cuevas watched defendant's house until a lightly-colored car matching the description given by the victim pulled up. Defendant got out of the car and went inside the house. When defendant eventually got back in the car and left, Officer Cuevas made a felony stop and defendant consented to a search of his car and home.

Detective Chris Bernacchi searched defendant's car and found, among other things, a handcuff case under the passenger seat, lotions, condoms, and a handcuff key in the center console. Detective Bernacchi searched defendant's home and found a Napa Valley Police Academy recruit jacket, sweatshirt, and shirt, and ammunition for a pellet gun, in the bedroom closet; a Napa Valley Police Academy recruit T-shirt with "Povadora" on the back, a pellet gun, a pair of handcuffs, and a "Security Special

Officer" badge, between the box spring and mattress of defendant's bed; and a Napa Valley Police Academy recruit identification card under defendant's nightstand. He also found a can of pepper spray on the dresser in defendant's bedroom.

Detective Newby searched defendant's car and found a towel on the driver's side floorboard. Based on information provided by defendant's ex-girlfriend, Jamie S., that she had found a green wallet and a set of keys she did not recognize, Detective Newby searched defendant's home a second time and found the green wallet containing Pamela W.'s identification in defendant's bedroom, a Napa Valley Police Academy identification card in a box in defendant's bedroom closet, and a picture of defendant wearing a T-shirt with "a police type emblem" on the front.

Defendant's Trial Testimony

Defendant testified and admitted having sexual relations with Phoebe N., Venus H., and Tonya P. but that they were, in each case, consensual. Defendant testified he never met Pamela W.

The jury found defendant not guilty of count 14 (assault on Norma F.), and the multiple victims allegation as to count 7 not true (forcible oral copulation of Phoebe N.), and not guilty of count 19 (kidnapping to commit rape of Pamela W.), but guilty of the lesser included offense of kidnapping of Pamela W. (§ 207, subd. (a)). The jury deadlocked on count 9 (first count of rape of Venus H.), counts 15 through 18 (all counts relating to Sonia R.), and count 21 (kidnapping to commit rape of Tonya P.), and found not true the two allegations that defendant was armed with a firearm as to counts 19 and 20 (Pamela W.). The jury found defendant guilty on all remaining counts and found all the remaining allegations true.

The trial court declared a mistrial on the deadlocked counts and allegations, dismissing them on the prosecution's motion, and sentenced defendant to 315 years to life plus 17 years in state prison.

I

Testimony of Phoebe N.

Defendant contends the trial court committed reversible error and rendered the trial constitutionally deficient when it admitted opinion testimony by Phoebe N. that there was never a point during the assault by defendant that she considered herself "to be having sex instead of being raped." We conclude that error, if there was error, in admitting the testimony was harmless.

On direct examination, the prosecutor asked Phoebe N. why she elected not to call the police after the assault by defendant. Phoebe N. responded, "Because they never find any of my other rape victims--I mean, my rapers, or whatever you call them, so why would they find this one?" Defense counsel asked to approach the bench and a discussion was held off the record.

During redirect examination, the prosecution asked Phoebe N., "So was there ever a point while you were being assaulted that you considered yourself to be having sex instead of being raped?" Phoebe N. replied, "No." Defense counsel objected and requested a sidebar, at which point another discussion was held off the record. Following the discussion at the bench, the prosecution again asked Phoebe N., "Was there ever a time during the course of this assault that you considered yourself to be having sex or engaging in sex with [defendant] as opposed to being raped?" Phoebe N. answered, "No, never."

Later, the trial court offered counsel the opportunity to put the earlier unrecorded discussions on the record. The district attorney said that, as to the reference to rape during the direct examination of the witness, it was unclear to her which acts the witness was referring to, those to which she was subjected or the acts as to others and that the district attorney immediately moved on. It was the prosecutor's opinion that the reference was not prejudicial and certainly did not merit a mistrial.

As to the district attorney's use of the word "rape" during redirect examination, she explained that defendant's attorney phrased questions to the witness that would support an argument that the acts were consensual and the district attorney was merely trying to distinguish consensual acts with rape.

The court noted that defense counsel made the objection and it was argued, and the same arguments were presented at sidebar. The court overruled the objection.

Defendant argues, as he did at trial, that the observations on which Phoebe N.'s opinion were based could otherwise have been conveyed by asking her whether she considered the sexual acts by defendant to have been consensual. We agree. But it is apparent that Phoebe N. was not commenting on the legal definition of rape but using the word merely as a street short-hand for non-consensual sex. In any event, any error in allowing Phoebe N. to testify that she regarded the assault on her by defendant as rape was harmless.

First, the term "rape" was utilized by counsel and the witnesses rather indiscriminately throughout the trial to describe various aspects of the alleged crimes. Defendant did not object when Phoebe N. identified a photograph as "[t]he lot where I got raped" and responded to a question by asking, "While he was raping me?" Similarly, other victims such as Sonia R. testified that "the rape--the rape happened at night," she explained that she did not want to talk with a male police officer "due to the case of the raping," she described that, during the assault, defendant laid her down on the back seat of the car "during the rape" and then placed a towel over her face and started "raping [her] constantly," and she explained that she was not certain whether defendant was a police officer "until after the rape."

Defendant did not object to any of these references, nor did he object when, on cross-examination, Sonia R. testified, "What I'm angry about is that he raped me and a couple of other girls," and "he deserves to go to prison for raping other people, too."

Referring to contested sexual acts as "rape" was a convenient reference to non-consensual sexual acts, not a legal conclusion.

It is clear to us that the questions asked of the various victims, and the responses elicited therefrom, touched on the state of mind of the victims as to whether they consented to defendant's sexual acts. We are confident the jury neither considered any of the victims to be experts on the crime of rape, nor relied on those victims for purposes of determining the elements of the crime of rape or whether those elements were met.

We note, too, that there was overwhelming evidence against defendant, most notably the testimony of Phoebe N., Venus H., Tonya P., and Pamela W., all of whom identified defendant as the man who assaulted them and all of whom gave detailed, corroborating facts regarding the assaults which, for the most part, bore very similar patterns of conduct by defendant; the DNA evidence tying defendant to the crimes; and the physical evidence found in defendant's home and car tying him to the crimes. In light of the overwhelming evidence against defendant, we find no reasonable probability that the jury would have reached a different result regarding defendant's guilt had the court precluded Phoebe N. from testifying that she considered defendant's assault on her to be rape rather than consensual sex. (*People v. Watson* (1956) 46 Cal.2d 818, 836; see *People v. Benavides* (2005) 35 Cal.4th 69, 91 [noting that "generally, violations of state evidentiary rules do not rise to the level of federal constitutional error" and applying the *Watson* standard for harmless error].)

Lastly, defendant avers that any doubt regarding prejudicial error should be resolved in his favor because the evidence against him with respect to the crimes against Phoebe N. was "closely balanced," and the fact that the jury acquitted him on some counts and hung on others demonstrates that the "government's overall case [was] weak." Again, we disagree. Phoebe N. accurately described defendant after the assault, and again at trial. She also accurately described the location where the assault occurred. Her description of the assault was consistent with the injuries she sustained, and defendant's

DNA was found on her clothes and inside her vagina. The handgun she said was used by defendant during the assault was found hidden under defendant's mattress. Perhaps most importantly, Phoebe N.'s description of the particular manner in which defendant assaulted her--pretending to be a police officer, taking her to a secluded location, and alternating back and forth between vaginal and anal sex--was consistent with the descriptions given by several of the other victims. The balance of the evidence tipped heavily against defendant and, as evidenced by the jury's verdict, the case against him with respect to the crimes against Phoebe N., Venus H., Tonya P., and Pamela W. was exceptionally compelling.

Any error in the admission of Phoebe N.'s testimony that she considered the sexual acts by defendant to be rape was harmless.

II

Prosecutorial Misconduct

Defendant contends he suffered prejudice from prosecutorial misconduct in closing argument.

During closing argument, the prosecution discussed the presumption of innocence and the burden of proof in a criminal case, noting the beyond a reasonable doubt standard is "the highest standard in the law." He explained that reasonable doubt is "not beyond a possible doubt, an imaginary doubt, a shadow of a doubt. It's reasonable. And it's reasonable based on an entire comparison and consideration of all the evidence--and I'll talk about that in a minute--that doesn't leave you with an abiding conviction of the truth of the charge."

Showing the jury a PowerPoint slide of a portion of a famous pointillist painting by Georges Seurat, the prosecutor said, "Now, this is a picture that I have to illustrate a point. If it doesn't mean anything to you yet, it shouldn't. It is a portion of a photograph or a picture. This is a very famous picture. You may or may not have seen it. It hangs in

Chicago. It was sort of the beginning of the digital age. It's not even a painting or a drawing. It's actually a series of dots. [¶] This picture is to illustrate that if you look at just that one portion of the picture, if you stand up so close to it and examine just a portion of the picture, you won't see the bigger picture and all the dots and the connection between people and animals and whatever else is contained in this photograph. [¶] So in a case like this, you may hear an argument from the defense that talks about analyzing each victim separately and kind of dissecting it or maybe grouping them into groups. You know, you've got your four victims who are prostitutes in one little category, and then you've got Pam. W. and Tonya P. They're all situated a little differently. Right? And they'll point to problems with one particular victim and then put that aside and now let's look at this one and put that aside. [¶] And the People ask that you do the exact same thing, with never losing sight of the big picture. So when you look at one part of the case or one part of the evidence, go ahead and take a close-up view of it. You should. Pay attention to the details of every little piece, but keep it in the context of a bigger picture, because if you listen to the law in this case, it will tell you it's a comparison of all the evidence, okay? [¶] All the evidence is one big picture. You can look at each part of it, but always remember there's a big picture and compare all the evidence as it relates to itself and to other evidence, as well."

Defense counsel objected to the argument as a misstatement of the law, arguing "there was an inference and there may have actually been an argument that they're not required to find each and every element beyond a reasonable doubt," and requesting that the court "issue a correctional instruction on that."

The court ruled as follows: "The instructions accurately set forth the law and the burden of proof, beyond a reasonable doubt, as to each element of each crime, and so the objection is noted but overruled."

During rebuttal, and with no further objection from defendant, the prosecutor reiterated that the jury should "look at each and every individual piece closely," but

"don't then just move on from it and pretend it doesn't exist and move to the next piece. Examine each piece individually and collectively." He told the jury they would hear that instruction in the law, for instance, "in the reasonable doubt instruction, you will hear an entire comparison of all the evidence. [¶] . . . [¶] So I'm . . . asking you to do only what the law asks you to do. There is no glossing over going on here." He further directed the jury to "look at all the evidence and you use your common sense and decide whether you have a doubt based on reason," and to "examine each witness' testimony. [¶] . . . [¶] . . . And like with all evidence, examine them individually and collectively. Right?"

Defendant contends the prosecutor's use of the pointillist painting, along with his remarks during closing and rebuttal argument, constitute misconduct because they implied defendant's guilt or innocence was based on "the big picture" rather than all of the "little pieces of evidence" necessary to convict him on each of the crimes alleged. We find no misconduct here.

" 'The applicable federal and state standards regarding prosecutorial misconduct are well established. " 'A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct "so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process." ' " [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves " ' "the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury." ' " [Citation.]' [Citation.]" (*People v. Smithey* (1999) 20 Cal.4th 936, 960 (*Smithey*), quoting *People v. Samayoa* (1997) 15 Cal.4th 795, 841 (*Samayoa*).)

When a claim of prosecutorial misconduct is based on comments made by the prosecutor before the jury, " 'the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.' " (*Smithey, supra,* 20 Cal.4th at p. 960, quoting *Samayoa, supra,* 15 Cal.4th at p. 841.)

The prosecutor began by telling the jury that it was his burden to prove defendant's guilt beyond a reasonable doubt, and that "[n]othing that I ever say removes that burden of proof from me or makes it less than what it is." He explained that reasonable doubt required the jury to compare and consider all the evidence, a statement which is consistent with the instruction given pursuant to CALCRIM No. 220 that, "[i]n deciding whether the People have proved their case beyond a reasonable doubt, you must impartially compare and consider all the evidence . . . ."

While the prosecutor told the jury that someone simply looking at a portion of the Seurat painting up close would not see "the bigger picture," he also told them to "take a close-up view of [the evidence]," "[p]ay attention to the details of every little piece," and "look at each part of [the evidence]," but to never lose sight of the big picture. Next, he prefaced his discussion of the elements of each of the alleged crimes and enhancements by telling the jury, "The instructions that the judge is going to read to you are the law that you are to rely on. [¶] These are what I believe to be pretty accurate summaries, but if ever there's any discrepancy between something that I say and what the judge reads, you follow what the judge reads. Okay?" We have difficulty understanding how this argument was inappropriate or how it could be taken as one that suggested to the jury that it was not required to find each and every element of the crimes alleged beyond a reasonable doubt.

Moreover, even if there was such a suggestion hidden in the prosecutor's argument, any doubt as to the prosecution's burden of proof or the jury's duty to consider all the evidence was dispelled by the court's instructions, which included instructions on the presumption of innocence, the prosecution's burden of proof beyond a reasonable doubt, that "[p]roof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true," and that in deciding whether the prosecution met its burden of proof, the jurors "must impartially compare and consider all the evidence that was received throughout the entire trial."

We conclude it was not reasonably likely the jury construed or applied the pointillist painting or the prosecutor's remarks made in conjunction therewith in an objectionable fashion.

III

"Firecracker" Instruction

Defendant contends the court erred in giving the supplemental "firecracker" jury instruction pursuant to *People v. Moore* (2002) 96 Cal.App.4th 1105 (*Moore*) in violation of the California Constitution and *People v. Gainer* (1977) 19 Cal.3d 835 (*Gainer*). As we will explain, defendant failed to preserve his claim for appeal.

Following completion of the evidentiary phase of the trial, the jury deliberated for two days and then, on the third day, announced it had reached verdicts on counts 1 through 7 (Phoebe N.), count 14 (Norma F.), counts 19 and 20 (Pamela W.), and counts 22 through 24 (Tonya P.), but could not agree on verdicts on counts 8 through 13 (Venus H.), counts 15 through 18 (Sonia R.), or count 21 (Tonya P.); nor could it agree on the special findings for counts 19 through 20 (Pamela W.).

Outside the presence of the jury, defense counsel moved for a mistrial. The prosecution opposed the motion and requested that the court give the "firecracker" instruction. After ruling, without objection, that it would instruct the jury pursuant to *Moore,* the court recessed to prepare the instruction. When the court reconvened, counsel was asked whether they had had an opportunity to inspect the proposed language. Both parties answered in the affirmative, and told the court they were ready for the jury. The trial court then instructed the jury in language virtually identical in all relevant respects to the instruction approved in *Moore, supra,* 96 Cal.App.4th at pages 1118-1121 (an opinion of this court).

Thereafter, the jury requested readback, first of all testimony regarding Sonia R., then only the testimonies of defendant, Newby, and Carson regarding Sonia R. They also

requested readback of all testimony regarding Venus H., then postponed that request, then later requested it again, along with the testimonies of defendant, Newby, and Mann regarding Venus H.

After deliberating three more days, the jury reached a verdict of guilty on counts 8, 10, 11, 12, and 13 (Venus H.), but could not reach verdicts on count 9 (Venus H.), counts 15 through 18 (Sonia R.), and count 21 (Tonya P.), or on the special findings on counts 19 and 20 (Pamela W.). The court declared a mistrial on the deadlocked charges, dismissing those charges in the interest of justice.

Defendant contends the "firecracker" instruction coerced minority jurors into reaching an opinion in violation of the California Constitution and *Gainer, supra,* 19 Cal.3d 835. He argues his claim is cognizable on appeal despite his failure to object below because his trial counsel's request for a mistrial "certainly suffices" to preserve the claim, and a challenge to an instruction that incorrectly states the law and affects the substantial rights of a party need not be preserved by an objection below.

Defendant provides no authority, nor are we aware of any, that supports his perfunctory claim that a request for mistrial suffices as an objection to a subsequently requested jury instruction. Defendant's motion for a mistrial was based on the jury's inability to reach verdicts on certain of the counts. Once that motion was denied, he acquiesced in the court giving the challenged instruction.

In any event, courts have long held that an appellant may not attack a ruling in which he expressly or impliedly acquiesced. Whether classified as invited error, waiver, forfeiture, or estoppel, the underlying principle is that on appeal it is simply unfair to the trial court and the opposing party to try to exploit an alleged error that could have been corrected below if pointed out in good time. (*Doers v. Golden Gate Bridge etc. Dist.* (1979) 23 Cal.3d 180, 184-185, fn. 1; *In re Marriage of Hinman* (1997) 55 Cal.App.4th 988, 1002; *Porter v. Golden Eagle Ins. Co.* (1996) 43 Cal.App.4th 1282, 1291; *Mesecher v. County of San Diego* (1992) 9 Cal.App.4th 1677, 1685-1686.)

Here, defendant's counsel did not object to the giving of the "firecracker" instruction or its language or argue that it had some sort of coercive effect on jurors who had been voting in the minority or somehow acted to pressure jurors into a unanimous verdict. In fact, when asked if she had had an opportunity to review the language with which the court proposed to instruct the jury and whether she was prepared to proceed, counsel replied, "Yes." Defendant acquiesced in the court's use of the "firecracker" instruction, and his claims of error are therefore barred.

IV

No Cumulative Harm

Defendant contends the cumulative effect of the foregoing three errors denied him a fair trial. Having found any error as to defendant's first claim was harmless, and having rejected his second and third claims of error, we also reject the claim that the resulting trial was not fair.

V

Dismissal of Lesser Included Offense

Defendant contends his conviction of false imprisonment of Pamela W. (count 20) must be reversed because it is a lesser-included offense to kidnapping Pamela W. (count 19) pursuant to section 207, subdivision (a). The Attorney General concedes the point. We accept the concession. (*People v. Magana* (1991) 230 Cal.App.3d 1117, 1120; *People v. Moran* (1970) 1 Cal.3d 755, 763.)

VI

Booking Fee

The trial court imposed a $270.17 booking fee and a $51.34 jail classification fee pursuant to Government Code section 29550.2. Defendant contends there is insufficient evidence of his ability to pay the fees as required by Government Code section 29550,

subdivisions (d)(1) and (d)(2), and thus the fee must be stricken. He contends his claim is cognizable on appeal because he is challenging the sufficiency of the evidence, a challenge not forfeited by his failure to object in the trial court.

The Attorney General disagrees, arguing defendant's failure to object below forfeited his claim on appeal. We agree with the Attorney General.

The right to appellate review of a nonjurisdictional sentencing issue not raised in the trial court is forfeited. (*People v. Gonzalez* (2003) 31 Cal.4th 745, 751-755; *People v. Scott* (1994) 9 Cal.4th 331, 356.) This court has previously held that if a defendant does not object in the trial court to the imposition of a fee or fine, the issue is forfeited. (*People v. Crittle* (2007) 154 Cal.App.4th 368, 371 [crime prevention fine--§ 1202.5, subd. (a)]; *People v. Hodges* (1999) 70 Cal.App.4th 1348, 1357 [jail booking fee--Gov. Code, § 29550.2]; see also *People v. Valtakis* (2003) 105 Cal.App.4th 1066, 1069-1072.) We have applied the forfeiture rule even when the claim on appeal is that there is not sufficient evidence to support the imposition of the fine or fee. (*People v. Gibson* (1994) 27 Cal.App.4th 1466, 1467, 1468-1469 (*Gibson*) [restitution fine--Gov. Code, former § 13967, subd. (a)].) This is so because defendant's plea of not guilty does not put the prosecution on notice that it will be required to present evidence of defendant's ability to pay. (*Gibson, supra*, at pp. 1468-1469.)

Defendant contends his claim finds support in *People v. Pacheco* (2010) 187 Cal.App.4th 1392 (*Pacheco*). There, the Sixth Appellate District struck a booking fee on the ground of insufficient evidence of ability to pay. (*Id.* at pp. 1399-1400.) Relying on its own precedents, the court concluded the issue had not been forfeited. (See *People v. Viray* (2005) 134 Cal.App.4th 1186, 1217; *People v. Lopez* (2005) 129 Cal.App.4th 1508, 1536-1537.) This holding created a conflict between *Pacheco* and the cases we cite in the text above. The California Supreme Court has agreed to resolve the conflict. (See *People v. McCullough* (2011) 193 Cal.App.4th 864, review granted on June 29, 2011, S192513.) Until the California Supreme Court issues further guidance, we continue to

adhere to our holding in *Gibson*; i.e., that a failure to object to a fee or fine in the trial court forfeits the issue, even where the statute contemplates a judicial finding of ability to pay and the defendant challenges the sufficiency of the evidence to support such a finding. (*Gibson, supra*, 27 Cal.App.4th at pp. 1467, 1468-1469.) "As a matter of fairness to the trial court, a defendant should not be permitted to assert for the first time on appeal a procedural defect in imposition of a restitution fine, i.e., the trial court's alleged failure to consider defendant's ability to pay the fine. [Citation.] Rather, a defendant must make a timely objection in the trial court in order to give that court an opportunity to correct the error; failure to object should preclude reversal of the order on appeal." (*Gibson*, at p. 1468.)

DISPOSITION

The judgment is modified to reverse the conviction of false imprisonment of Pamela W. (count 20). As modified, the judgment is affirmed. The trial court is directed to amend the abstract of judgment accordingly and to forward a certified copy of the amended abstract to the Department of Corrections and Rehabilitation.

HULL, Acting P. J.

We concur:

BUTZ, J.

MAURO, J.